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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.
15714

BERNARD SANDOVAL, :

Defendant-Appellant. :

----- : -----
BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE THIRD
JUDICIAL DISTRICT COURT, IN AND FOR SALT
LAKE COUNTY, STATE OF UTAH, THE HONOR-
ABLE JAY E. BANKS, JUDGE, PRESIDING

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FILED

OCT 13 1978

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No. 15714
BERNARD SANDOVAL, :
Defendant-Appellant. :

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with the crime of aggravated robbery, in violation of § 76-6-302, Utah Criminal Code.

DISPOSITION IN LOWER COURT

Appellant and two co-defendants were tried jointly on January 12-13, 1978, before a jury in the Third District Court of Salt Lake County. The Court below denied appellant's motion for severance and/or mistrial and subsequently denied his motion for a new trial. Appellant and co-defendants were all found guilty of the crime of aggravated robbery, a felony of the first degree.

Appellant was sentenced to a term of five years to life but was granted a stay of sentence and placed on probation.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the judgment of the lower court.

STATEMENT OF THE FACTS

Appellant and co-defendants Carter and Morishita were charged with having committed the crime of aggravated robbery on or about the 31st day of March, 1977. (R. p. 11). On January 12, 1978, appellant and co-defendants were jointly brought to trial before a jury in the Third District Court of Salt Lake County.

After respondent rested its case, appellant's counsel did not call appellant to the stand, but rested his case without exercising appellant's right to testify.

Counsel for co-defendant Morishita then stated during his opening statement that he would call appellant to the stand to testify (R. p. 337). Counsel for appellant objected and the court sustained the objection. The court then admonished the jury to disregard the matter, stating that a defendant could not be called to the stand involuntarily. (R. p. 437).

A conference was subsequently held at the side bar during which the court informed counsel for co-defendant Morishita that he could not call appellant Sandoval to the stand to testify. Appellant's counsel at this time also stated that appellant would not take the stand. (R. p. 263).

After counsel for co-defendant Morishita completed his opening statement, the court directed him to call his first witness. At that time, counsel for Morishita called appellant Sandoval to the stand. (R. p. 337). Counsel for appellant objected and the objection was sustained by the court.

Counsel for appellant then moved for a severance and/or mistrial and his motion was denied. (R. p. 337).

Subsequent to the trial, counsel for appellant filed a motion for a new trial (R. p. 158), which motion was denied by the court. (R. p. 166).

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR NOR
ABUSE ITS DISCRETION IN DENYING
APPELLANT'S MOTION FOR SEVERANCE
AND/OR MISTRIAL.

Appellant contends that the trial court should have granted his motion for severance and/or mistrial on the

grounds that appellant was prejudiced by the conduct of counsel for co-defendant Morishita.

Although appellant concedes that the announcement by counsel for co-defendant Morishita of his intention to call appellant to the stand was most likely insufficient to prejudice the jury, he claims that the subsequent actual calling of appellant by counsel for Morishita focused the attention of the jury on appellant's failure to testify in the same manner as if direct comment had been made.

In support of his contention, appellant cites the case of Deluna v. United States, 308 F. 2d 140 (5th Cir. 1962) reh. denied 324 F. 2d 375 (1963), which can be distinguished from the case at bar. In Deluna, the comments made by the co-defendant's attorney were several and included contrasting his client's willingness to take the stand with the co-defendant's unwillingness to do so. The trial judge in Deluna made matters worse with an instruction that admonished the jury to not disregard the testimony of the co-defendant which had the effect of incriminating the other co-defendant who had failed to testify.

The nature of the prejudicial comments in Deluna differs significantly from the statement made in the instant

case. Subsequent cases have distinguished Deluna and held that comments on the defendant's failure to testify are not always reversible error. Certainly the inference to be drawn from a comment on the defendant's failure to testify is substantially stronger than the inference which might be drawn from simply calling defendant to the stand; yet the Courts have determined that even comments made in certain instances are not prejudicial error.

In United States v. Alpern, 564 F. 2d 755 (7th Cir. 1977), citing the case of United States v. Hutul, 416 F. 2d 607 (7th Cir. 1969), the court distinguished Deluna and held that counsel's comment created no reversible error. In Alpern, as in Hutul, the court said that counsel's comment on defendant's failure to take the stand was but an:

" . . . isolated and oblique reference to his co-defendant's failure to take the stand having no prejudicial effect that could not be cured by the cautionary instructions given in this case." Id. at 761.

Similarly, the Fifth Circuit has distinguished its decision in Deluna, limiting Deluna to its facts, i.e., to cases wherein defendants rely on mutually inconsistent theories of defense. Other jurisdictions have taken the same view of Deluna's precedential value. E.g. United States v. Hines, 455 F. 2d 1317 (U.S. App. D.C. 1972) cert denied,

406 U.S. 969; United States v. Shuford, 454 F. 2d 772 (4th Cir. 1971). Further, the Fifth Circuit distinguished Deluna in the case of United States v. Washington, 550 F. 2d 320 (5th Cir. 1977) where, unlike Deluna, comments regarding defendant's failure to testify were made merely in the summation of facts and no reversible error was found.

In a still more recent case, United States v. Riech, 572 F. 2d 1390 (6th Cir. 1978), the Sixth Circuit distinguished Deluna on the basis that comment made by the co-defendant in argument regarding defendant's failure to testify was (1) isolated and (2) not the result of any conduct on the part of the prosecution and (3) that the court instruction to the jury cured any error.

At the trial of the present case, no comment was made on appellant's failure to testify. Appellant was simply called to the stand and exercising his privilege, chose to remain silent. No comment on appellant's failure to testify was made in the presence of the jury.

Section 77-31-6, U.C.A. (1953 as amended) provides for a joint trial of two or more defendants charged with the same offense unless the trial court uses its discretion to sever. On review, the general test for error turns upon whether or not the record of the case at hand reflects an abuse of that discretion. See State v. Rivenburgh, 11 Utah 2d 95, 355 P. 2d 689, 698 (1960); State v. Lybert, 30 Utah 2d 95, 355 P. 2d 689, 698 (1960).

180 515 P. 2d 441, 442 (1973); and State v. Gaxiola, 550 P. 2d 1298 (Utah 1976).

This Court in State v. Gaxiola, 550 P. 2d 1298 (Utah 1976), upheld the trial court's denial of co-defendant's motion for severance. The motion was based on alleged antagonistic defense. In Gaxiola, co-defendants were jointly prosecuted for murder. This Court said:

"Since a demand for severance is not a matter of right, it must appear the trial court had before it facts which would indicate defendant would be unduly prejudiced before this court can hold that there had been an abuse of discretion."
Id. at 1301.

Section 77-42-1 U.C.A (1953 as amended) requires that errors which do not affect substantial rights of the parties be disregarded. See State v. Scandrett, 24 Utah 2d 202, 468 P. 2d 639 (1970). In the event error has been committed, it is not presumed to have resulted in prejudice and the Court must be satisfied the error had a prejudicial effect before it is warranted in reversing the judgment.

This court in State v. Hodges, 30 Utah 2d 367, 517 P. 2d 1322 (1974), upheld the trial court's denial of severance. In Hodges, the prosecuting attorney inquired as to whether the defendant, on trial for robbery and assault with a deadly weapon, had used the same gun to perpetrate another robbery.

The court sustained defendant's counsel's objection but denied his motion for severance, and admonished the jury to base its verdict solely on the evidence introduced at trial. In support of its decision not to reverse, this Court stated:

" . . . there should be no reversal of a conviction merely because of error or irregularity, but only if it is substantial and prejudicial in the sense that in its absence there is a reasonable likelihood that there would have been a different result." (Emphases added) Id. at 1325.

Thus, according to Gaxiola, absent a showing of actual prejudice to appellant and absent a showing of a reasonable likelihood that there would have been a different result, Hodges, the trial court's denial of appellant's motion for severance and/or mistrial should be upheld by this Court.

POINT II.

THE TRIAL COURT DID NOT ERR NOR
ABUSE ITS DISCRETION IN DENYING
APPELLANT'S MOTION FOR NEW TRIAL.

Appellant filed a motion for new trial on the ground that appellant was denied due process of law when he was called to testify by counsel for co-defendant Morishita.

Appellant cites U.C.A. 77-44-5 (1953) which states that a defendant's failure or refusal to testify "shall not

in any manner prejudice him or be used against him on the trial or proceeding."

In the instant case, appellant was not prejudiced by his exercise of his right to silence. There was no comment here to the effect that he failed to come forth and testify. Whether he was called by co-defendant or a prosecutor and refused to take the stand creates no more prejudice towards him than if he were to sit there in silence. In either instance the jurors are aware of the fact that he has not testified. The jurors in this case were admonished by the trial court that a defendant could not be called to the stand involuntarily and that his failure to testify is not an admission of guilt nor can it be used against him.

As appellant points out, this Court in State v. Scandrett, 24 Utah 2d 202, 468 P. 2d 639 (1970), adopted the position that when a fundamental constitutional right has been abused or denied, any error pertaining thereto is presumed to be prejudicial. However, this Court went on to state that the error is not prejudicial per se since there are certain circumstances where the violation of a constitutional right could have no possible bearing on any unfairness or imposition upon the defendant or upon a correct determination of his guilt or innocence.

For example, in the case of United States v. Sigal, 572 F. 2d 1320 (9th Cir. 1978) the court concluded that certain comments made by the prosecution, taken on face value as the court assumed the jury would take them, constituted a comment on defendant's failure to testify and thus was an error of constitutional dimension. However, citing Chapman v. California, the Court stated that automatic reversal does not result if the error can be said to have been harmless beyond a reasonable doubt. The court decided the issue by applying the test set forth in Anderson v. Nelson, wherein the court said that such a comment was reversible error when "such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could have been supported acquittal." The court in Sigal determined the error to be harmless and stated:

"Here the comment was not extensive, there was minimal stress on any inference of guilt to be drawn by the jury from the silence, and there was no substantial evidence which supported an acquittal."
Id. at 1323.

Thus, as the court in Sigal demonstrated, even error determined to be of constitutional significance and so presumably prejudicial can be harmless error and not prejudicial as appellant contends.

As illustrated in State v. Scandrett, 24 Utah 2d 202, 468 P. 2d 639 (1970), this presumption can be overcome when the court is "convinced beyond a reasonable doubt" that it had no such prejudicial effect upon the proceedings. This Court further stated:

"Correlative to this it is also true that when the guilt is shown by other untainted evidence so overwhelming that there is no likelihood whatsoever of a different result in the absence of such error or irregularity, there should be no reversal." Id. at p. 643 (Emphasis added)

Respondent submits that this is the case here. Absent the likelihood of a different result had the appellant not been called by counsel for Morishita, the ruling of the trial court denying appellant's motion for a new trial should be upheld.

POINT III.

APPELLANT WAS NOT DEPRIVED OF HIS
FUNDAMENTAL RIGHT TO TRIAL BY A
FAIR AND IMPARTIAL JURY IN THAT
THE TRIAL COURT ADMONISHED THE
JURY TO DISREGARD THE ACTIONS OF
COUNSEL FOR MORISHITA IN CALLING
APPELLANT TO THE STAND.

Appellant claims that the trial court's failure to grant his motions for severance or a new trial deprived him of a fundamental constitutional right--the right to be

tried before an impartial jury. Appellant claims that the inferences to be drawn from his refusal to take the stand after being called by counsel for co-defendant Morishita prejudiced the jury as to appellant.

Appellant cites State v. Scandrett, 24 Utah 2d 202, 468 P. 2d 639 (1970) decided by this Court, as setting forth the standard of review for an alleged violation of a fundamental constitutional right. In Scandrett, this Court stated that there is a presumption that error violating a constitutional right is prejudicial but further stated that such presumption can be overcome when the court is convinced beyond reasonable doubt that the error had no such prejudicial effect upon the proceedings.

Appellant was not denied a trial by an impartial jury. Even if respondent were to concede that the calling of appellant to the stand by counsel for co-defendant Morishita was improper, the court prevented any prejudice to the appellant arising out of that incident by admonishing the jury to disregard it.

In State v. Cox, 74 U. 149, 277 P. 972, at 974, this court stated that there is not reversible error if comment is made regarding the failure of an accused to testify so long as the court admonishes the jury to disregard the same. Here we do not have comments but merely the calling of

appellant to the stand. The court admonished the jury to disregard the same and the appellant was not prejudiced thereby.

In the case at bar, appellant was tried by a fair and impartial jury and in the absence of any prejudicial error during the proceedings, appellant suffered no deprivation or denial of a fundamental constitutional right.

CONCLUSION

Respondent respectfully submits that in view of the arguments presented above, the appellant's conviction should be affirmed.

Respectfully submitted,

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